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No. 87-65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PROVIDENCE JOURNAL COMPANY and
CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

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RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

Respondents Providence Journal Company and Charles M. Hauser respectfully move this Court for an order dismissing the writ of *certiorari* in this case for the reasons set forth below. The petition for a writ of *certiorari* was granted on October 5, 1987. The grounds for this motion did not and could not have become evident to counsel for respondents until after the petition was granted.

THE BASIS FOR THE INSTANT MOTION

The questions presented by this motion are whether the petition for a writ of *certiorari* filed in the name of the United States of America was, in fact, properly filed on behalf of the United States, and whether the United States may lawfully be represented in this Court by a special prosecutor appointed by

the district court (Hon. Francis J. Boyle, C.J.) but not authorized to represent the United States by the Attorney General or the Solicitor General. 28 U.S.C. § 518(a) provides that the Attorney General, the Solicitor General or their designee shall conduct and argue all cases before this Court "in which the United States is interested." In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987) ("*Young*"), a majority of this Court concluded that courts have inherent authority to initiate contempt proceedings for alleged disobedience of court orders. It did not, however, rule that, notwithstanding the explicit language of section 518(a) to the contrary, a writ of *certiorari* on behalf of the United States may be sought and the United States represented in this Court by a special prosecutor who has not obtained the authorization of the Attorney General or the Solicitor General. That is what has occurred and is occurring in this action.

This is a matter of fundamental import, relating to the ability of the Congress and the executive, through the legislative process, to exercise control over who is authorized to speak for the United States in this Court, and to ensure that decisions as to what matters are presented on behalf of the United States for consideration and ultimate resolution are confided to those in whom they repose trust.

The background of the newly revealed circumstances giving rise to this motion is not in dispute. When the *Providence Journal* published its article of November 14, 1985, Raymond J. Patriarca ("Patriarca"), plaintiff in the underlying action, filed a "Motion to Adjudge in Contempt" (JA 223).[1] The district court did not turn to the United States Attorney to prosecute as required by this Court's subsequent holding in *Young* because, the court said, the United States Attorney represented "parties who are defendants in this action" (JA 237). That reason, now deemed by the Solicitor General to be

1 References to "JA __" are to appropriate pages of the Joint Appendix in this case.

"insufficient" (S.G. Br. at 1)[2]—and Patriarca's own refusal to serve as prosecutor in the contempt proceedings he commenced—led the court to appoint a special prosecutor pursuant to Federal Rule of Criminal Procedure 42(b) (JA 237). That prosecutor conducted this litigation at the district court level and in the Court of Appeals. After the Court of Appeals ruled that the convictions at issue should be vacated and clarified the procedures to be followed in such circumstances in the future, the special prosecutor proceeded to file a petition for a writ of *certiorari* in this Court. The Solicitor General's brief, *amicus curiae,* leaves little room for doubt that it was the special prosecutor who determined to file the petition for a writ of *certiorari* in this action and did so in the name of the United States without the authorization of the Solicitor General or the Attorney General (S.G. Br. at 2-3 n.2).[3] We urge in this motion that the petition was not filed by the United States of America and that this appeal is not being conducted by the United States of America. That being so, the writ of *certiorari* should be dismissed.

2 In light of the potential for confusion in referring to two briefs filed by different entities, each purportedly on behalf of the United States, we refer to the brief of the United States of America as petitioner as "Petitioner's Brief" or "Pet. Br. __" and to the "Brief for the United States as *Amicus Curiae* Supporting Petitioner" as the "Solicitor General's Brief" or "S.G. Br. __."

3 Until the filing of the Solicitor General's brief, *amicus curiae*, respondents were not aware that the special prosecutor was not authorized by the Attorney General or the Solicitor General to conduct proceedings before this Court on behalf of the United States. It is for that reason that respondents have raised this issue now by way of motion. *See* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, § 16.8(b) (6th ed. 1986).

ARGUMENT

The petitioner in this appeal is said to be the United States of America. It is in the name of that sovereign that the petition for a writ of *certiorari* was filed seeking to reinstate a finding of criminal contempt, the imposition of a $100,000 fine, an 18-month jail sentence (which has been suspended), and other sanctions. Yet, special counsel appointed by Judge Boyle was never authorized to file a petition for a writ of *certiorari* on behalf of the United States, nor was he ever authorized to conduct or argue the case on behalf of the United States in this Court.

Section 518(a) provides:

> Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Claims Court or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United States is interested.

28 U.S.C. § 518(a) (1982).[4]

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4 The Attorney General has delegated his authority under section 518(a) to the Solicitor General by way of regulation which provides:

> The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, in consultation with each agency or official concerned:
>
> (a) Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and . . . settlement thereof.
>
> (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts . . . .

28 C.F.R. § 0.20 (1987). This regulation has the "force of law." *See United States* v. *Nixon*, 418 U.S. 683, 695 (1974). Just as the regulation at issue in the *Nixon* case, "[s]o long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it." *Id.* at 696.

This appeal is not one in which the United States has merely some peripheral interest, *Brawer* v. *Horowitz*, 535 F.2d 830 (3d Cir. 1976); rather, it is one in which the United States is itself the petitioner, the entity seeking to reinstate a judgment which involves a possible prison sentence for one defendant and a substantial fine for another. Both in his *amicus* brief (S.G. Br. at 2) and in his motion for divided argument, the Solicitor General makes it clear that the United States has a "significant interest" in this case. Motion For Divided Argument and For Leave to Participate in Oral Argument at 2. Despite that "interest," the United States is being represented and has been represented in this Court not by the Attorney General or the Solicitor General, nor by their designee, but by a special prosecutor whose "client" is a single judge who determined to prosecute a contempt, to defend an appeal from his finding of contempt, and then to seek a writ of *certiorari* from the decision reversing that contempt. It does not overstate the point to say that, when all this occurs in the name of the United States, this is a case—at least as a matter of affording a plain reading to section 518(a)—"in which the United States is interested."

Section 518(a) reflects the clear intention of Congress that the United States speak with one voice before this Court and that the decision-making power as to what positions should be taken on behalf of the United States should rest in the Attorney General or the Solicitor General. Long before Congress chose to delineate the broad duties now specifically conferred on the Attorney General (*see* 28 U.S.C. §§ 501 *et seq.* (1982)), it made clear the special role of the Attorney General to conduct the business of the United States before this Court.[5] This special role has been explicitly recognized by this Court:

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5 As originally proposed, section 35 of the Judiciary Act of 1789 gave the United States Supreme Court the power to appoint the Attorney General of the United States, who was charged with the duty "to prosecute and conduct all suits in such Courts in which the United States shall be concerned . . . ." Congress rejected that proposal,

Control of these suits, therefore, while they were pending in the Circuit Court, belonged to the district attorney under the general superintendence and direction of the Attorney-General, and he might, if he had seen fit, have discontinued them at any stage of the proceedings prior to the appeals. *Such control on the part of the district attorney ceases whenever such a suit, civil or criminal, is transferred to this court by writ of error, appeal, or certificate of division of opinion, as the thirty-fifth section of the Judiciary Act also provides, that it shall be the duty of the Attorney-General to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and such has been the unbroken practice of this court in such suits from the organization of the judicial system to the present time.* Appointed, as the Attorney-General is, in pursuance of an act of Congress, to prosecute and conduct such suits, argument would seem to be unnecessary to prove his authority to dispose of these cases in the manner proposed in the respective motions under consideration, but if more be needed, it will be found in the case of *The Gray Jacket*, in which this court decided that in such suits no counsel will be heard for the United States in opposition to the views

choosing instead to vest that power in the President. C. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 109 (1923). As enacted, section 35 of the Judiciary Act provided in pertinent part:

> And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States who shall be sworn or affirmed to a faithful execution of his office; *whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned*, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.

Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 93 (emphasis added).

> of the Attorney-General, not even when employed in behalf of another of the executive departments of the government.

Confiscation Cases, 74 U.S. (7 Wall.) 454, 458 (1868) (emphasis added; footnote omitted).

As the Court observed in *United States* v. *Winston*, 170 U.S. 522, 524 (1898):

> When a case in which the government is interested comes to this court from any lower court it falls by the terms of the statute within the special care of the Attorney General.

After setting forth the terms of the statute, now codified as 28 U.S.C. § 518, the Court continued:

> Under this section the Attorney General may, in his discretion, make other arrangements for the management of such a case, but this discretion does not abridge the fact that the full responsibility and control are imposed directly upon him as the head of the Department of Justice.

170 U.S. at 525.[6]

6 Congress has created one limited exception to section 518. When creating the United States Court of Claims and the United States Court of Appeals for the Federal Circuit and adding them to the courts listed in section 518(a) in which the Attorney General and Solicitor General "shall conduct and argue suits," it made an exception for "'the authority of the Tennessee Valley Authority . . . to represent itself by attorneys of its own choosing'" in the courts listed in section 518(a). *Cooper* v. *Tennessee Valley Authority*, 723 F.2d 1560, 1563 (Fed. Cir. 1983) (discussing 28 U.S.C. §§ 41, 171-177 (1982)). Congress did the same thing when creating the Court of International Trade and adding it, too, to section 518(a). *Id.* at 1564 (discussing 28 U.S.C. § 251 (1982)). While the United States has an obvious interest in cases involving its agency the Tennessee Valley Authority, Congress has decided that the TVA should be allowed to represent itself before this Court. The Solicitor General's office, as well, has recognized the TVA's authority to conduct its cases before this Court. *Algernon Blair Industrial Contractors, Inc.* v. *Tennessee Valley Authority*, 540 F. Supp. 551, 555 (M.D. Ala. 1982).

In his brief before this Court in *Young* itself, the Solicitor General specifically recognized the force of section 518 and its requirement that a special counsel appointed under Rule 42(b) could not conduct proceedings in this Court on behalf of the United States without specific authorization from the Solicitor General. And, in *Young*, the Solicitor General gave his specific authorization for special counsel to proceed.[7] The position of the Solicitor General now is that, in light of this Court's decision in *Young*, no such authorization "is required in order for the specially appointed private attorney to seek review in this Court on the district court's behalf." (S.G. Br. at 3 n.2) Thus, the Solicitor General maintains, the United States should not be deemed "interested" in a case prosecuted by a special prosecutor "on a district court's behalf" in the name of the United States, but only in "cases in which the United States is 'interested' by virtue of the constitutional and statutory responsibilities of the Executive Branch." (S.G. Br. at 2 n.2) The Solicitor General cites no authority for his position and it is difficult to see how this Court's decision in *Young*—where no

7 In his brief before this Court in *Young*, the Solicitor General advised the Court as follows:

> The respondent in each of these cases is the United States, albeit on the relation of private entities, and the United States is the proper opposing party in any prosecution for criminal contempt. . . . This case therefore would appear to fall within the scope of 28 U.S.C. 518(a), which provides that unless "the Attorney General in a particular case directs otherwise," the Solicitor General is to conduct and argue all cases in this Court "in which the United States is interested." However, in order to assure that the Court may have the benefit of the arguments in support of the appointment of interested private counsel in a case such as this, the Solicitor General has authorized the counsel who were appointed by the district court to appear on behalf of the respondent in this Court as well. Accordingly, the Solicitor General files this brief on behalf of the United States as *amicus curiae* to express the distinct views of the Executive Branch.

Brief for the United States, as *Amicus Curiae*, in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, Nos. 85-1329, 85-6207 at 2 n.1.

specific statutory command such as section 518 was at issue—can be read to support the view that a statute specifically addressed to the representation of the United States before this Court can be so easily overcome.

It is true, of course, that the plain command of section 518 could result in a situation where a special prosecutor who would otherwise choose to do so would be precluded from seeking review by this Court where the Attorney General declines to authorize him to do so. Yet that is a decision clearly within the province of Congress. U.S. Const. art. III, § 2; *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).[8] Here Congress has spoken quite clearly. It can hardly be subject to dispute that the legislative branch has the power to vest authority in the Attorney General to determine which cases will be presented to this Court and how those cases will be presented in order to ensure that the United States as sovereign will pursue justice for the public good in an orderly and stable way.

Putting aside the disregard for the plain language of section 518 that the Solicitor General's reading requires, there is, to be sure, a case to be made that, in light of this Court's conclusion in *Young* that it is essential for the judiciary to be empowered to punish disobedience to judicial orders "without complete dependence on other branches" (107 S.Ct. at 2131), a district court should be permitted to determine on its own when and whether to seek review by this Court. But any such argument surely proves too much. It permits any aggrieved district court judge, as Judge Boyle, who appoints a special prosecutor to determine for himself whether or not to seek *certiorari* in a criminal contempt case prosecuted to vindicate what he believes to be the dignity of his court. It transforms the voice of the "United States" in such a case into the voice of that single

8 In fact, for more than 100 years, criminal cases from the federal courts were not generally reviewable in the Supreme Court. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1539 n.3 (2d ed. 1973).

judge.[9] Surely the "United States" for whom the special prosecutor would purport to speak in such an appeal would be a sovereign far narrower than "the United States as the sovereign composed of the three branches . . . ." *United States* v. *Nixon*, 418 U.S. 683, 696 (1974). Indeed, the "United States" for whom the special prosecutor claims to speak in this appeal is not even the entire judiciary, since no central judicial repository exists to play the role of the Solicitor General's office in determining a uniform position for that branch of government. The "United States" that sought the writ of *certiorari* granted by this Court, and that has been and is conducting this appeal, is thus nothing more than the same district court judge who considered the dignity of his court to have been affronted.[10]

To give effect to section 518 does not, in any event, leave the judiciary powerless to enforce its lawful orders. A district judge may, subject to the restrictions of *Young* itself, appoint a

9 This result is particularly troubling where, as here, the United States, in the form of the Department of Justice, had argued to the district court that it lacked subject matter jurisdiction over the underlying action (JA 184, 227-232) and the same United States, in the form of the special prosecutor, has argued to this Court not only that the district court had subject matter jurisdiction but that the question of the district court's jurisdiction over the underlying action is determinative of the merits of this appeal (Pet. Br. at 17-18 & n.5).

10 It is worth posing the question of what would have happened if, as *Young* enjoins district judges to do (and as the Solicitor General maintains should have been done here), Judge Boyle had requested the Department of Justice to prosecute this appeal. If the Department had done so and had obtained a conviction, the conviction had been reversed by the First Circuit and the Department of Justice had determined not to seek a writ of *certiorari*, could Judge Boyle have required it to do so? If the Solicitor General's interpretation of *Young* is correct, it should follow that Judge Boyle and not the Solicitor General should determine whether a petition were to be filed. But there is surely no warrant yet recognized in law which would require the Department of Justice to petition this Court to issue a writ when the Department believed it would be against the interests of the United States to do so.

special prosecutor; that contempt proceeding will be heard and resolved by the judiciary alone. Any appeal of a conviction will, as here, be heard and decided by the Court of Appeals. It is hardly an affront to judicial dignity when such judges determine that a conviction should not stand.[11]

The difficulties engendered by permitting a special prosecutor not appointed by the Attorney General or Solicitor General to represent the United States are well illustrated in this case. Here, the special prosecutor's "United States" has argued that "[i]f there is any exception to the general rule" that court orders must be obeyed, "it arises only where there might be lack of jurisdiction due to be (*sic*) bad faith of the Court." Pet. Br. at 32 n.15. Yet, the Solicitor General's brief acknowledges, to the contrary, that "a party may not be held in criminal contempt for violation of an order that exceeds the jurisdiction of the issuing court." *See* S.G. Br. at 11. The special prosecutor defends the district court's extensive reliance on the previous ruling of the First Circuit, which affirmed, while Patriarca's father was alive, the FBI's denial of the *Journal*'s Freedom of Information Act request. According to the special prosecutor, "*The Journal*, as a party to the prior litigation, presumably knew very well of the First Circuit's rulings regarding the materials in question. . . . It nevertheless resumed its efforts to obtain the information about Patriarca which was constitutionally protected." (Pet. Br. at 33) The Solicitor General's brief, in contrast, offers not a word in support of a misreading of law so plain that it condemns the *Journal* simply for

11 The contempt convictions in this case arose before the Court of Appeals clarified the procedures for challenging an unconstitutional prior restraint, which it did in this case. That the Court of Appeals determined that those convictions could not stand is not unlike the situation in *United States* v. *McKenzie*, 735 F.2d 907 (5th Cir. 1984). There the Court of Appeals for the Fifth Circuit held that where the very district court that had appointed special prosecutors to pursue a contempt conviction later dismissed the contempt charges, the special prosecutors did not represent the United States and could not appeal that dismissal on behalf of the United States.

renewing an FOIA application with the FBI after the significantly changed circumstances of Patriarca's father's death.[12]

This Court has recently taken pains to assure itself that a party that claimed to be before it actually represented the entity for which it claimed to speak. The failure of a state formally to appeal a judgment striking down one of its statutes, even though it did remain a party in the appeal and did file a document in this Court advising that its position was "essentially co-terminous" with that of private appellants defending the statute, has been held to leave the court without a case or controversy to decide. *Diamond* v. *Charles*, 106 S.Ct. 1697, 1703-04 (1986) (to be officially reported at 476 U.S. 54). The failure of state representatives who had filed an action on behalf of a state legislative body to remain in the positions they had previously held has been held to deprive them of the standing they previously had to pursue an appeal. *Karcher* v. *May*, 56 U.S.L.W. 4022 (U.S. Dec. 1, 1987) (No. 85-1551).

12 Several courts have indicated that the death of an individual who is the subject of an FOIA request for agency records, in addition to the passage of time, is a valid criterion for consideration by an agency in determining whether disclosure would constitute an unwarranted invasion of privacy. *See e.g.*, *Kiraly* v. *Federal Bureau of Investigation*, 728 F.2d 273, 277-78 (6th Cir. 1984); *Diamond* v. *Federal Bureau of Investigation*, 707 F.2d 75, 77-78 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984); *Powell* v. *United States Department of Justice*, 584 F. Supp. 1508, 1526 (N.D. Cal. 1984).

CONCLUSION

Here, a writ of *certiorari* was purportedly sought on behalf of the United States by individuals without authority to seek it. The appeal in this matter has been conducted and argument noticed by persons who, given section 518(a), do not represent the United States. The writ of *certiorari*, in these circumstances, should be dismissed.

Respectfully submitted,

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